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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VINCENT ESPOSITO, WEST PIERRE, MIKE DeLAPE, LEE SPENCER, ERNEST HODGES, DANIEL A. SMITHY, MIKE MINITELLO, and AL SPENCER, On Behalf of All Present and Former Mister Softee Franchises in the Queens-Nassau Area,

Petitioners,

— v. —

MISTER SOFTEE, INC., MISTER SOFTEE EASTERN NEW YORK DIV., INC., RO-FI CORP. and C & C DISTRIBUTORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents Mister Softee, Inc., Mister Softee Eastern New York Div., Inc., Ro-Fi Corp. and C & C Distributors, Inc. respectfully request that this Court deny the Petition for a writ of certiorari, seeking a review of the Second Circuit's opinion in this case. That opinion is contained in the Appendix to the petition (109a-113a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Nominal Damages Issue*

Petitioners urge that the refusal of the District Court and the Second Circuit to award nominal damages in this case is in direct conflict with decisions of the Eighth and Ninth Circuits

and, further, presents important issues which should be reviewed by this Court. In fact, however, even assuming the issue of nominal damages in Section 4 cases to be of substantial importance, there is no direct conflict among the Courts of Appeals. Moreover, as a more detached review of the Second Circuit's decision will demonstrate, the issues framed by petitioners as Questions Presented "1" and "2" are not squarely posed by the record.

Thus, petitioners characterize the issue as whether nominal damages should be awarded under Section 4 of the Clayton Act "where the proof is insufficient as to the *measurement* of damage" (Petition at p. 8) (*Emphasis supplied.*) The clear implication is that petitioners did prove that they were overcharged for supplies by respondents, but were unable adequately to establish *the extent* of the overcharge. However, such a characterization cannot be extracted from the opinions below. Rather, the courts below held that petitioners completely failed to show that they were overcharged for their supplies *at all*.

Indeed, petitioners mislead this Court by referring to the District Court's initial 1979 opinion on liability that "the tied merchandise was overpriced" (Petition at p. 6), without pointing out that, after the second trial three years later on damages (after extensive discovery was held), the District Court changed its initial conclusion and held as follows:

> "Our finding of injury following the liability trial was based upon testimony respecting purchases made at prices below Ro-Fi's prices. Upon closer examination, we find that such testimony concerned inferior products or was not credible" (99a-100a).

While expressly following the "liberal approach" on proof of damages, the District Court found that "the record as a whole does not show that plaintiffs were overcharged for the items sold by Ro-Fi" (87a). For example, with respect to the group purchases referred to in the Petition (at p. 6), the District Court found that the supplies purchased "were generally of a poorer quality than the supplies offered by Ro-Fi and were purchased at less favorable terms regarding credit, convenience and stor-

age" (81a-82a). Indeed, the District Court found that *respondents*—even though they did not have the burden of proving the lack of overcharging—"clearly established, at the damage trial, the inferior quality of the mix, toppings and almost all paper goods as sold by other suppliers at prices below Ro-Fi's price" (86a).

The Second Circuit agreed with the District Court that petitioners did not adduce evidence of *any* overcharge for their supplies; there was not just a failure to establish *the quantum* of overcharge (111a-112a). Under the circumstances, the Second Circuit ruled that nominal damages should not be awarded and that the District Court's vacatur of its interlocutory finding of liability was proper.

Contrary to petitioners' claim, such ruling does not conflict with that of any other Circuit Court. The cases cited in the Petition (at p. 8) are inapposite. Thus, in *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981), *cert. denied*, 457 U.S. 111 (1982), plaintiff manufactured and installed burial monuments. Defendant cemetery owners had agreed among themselves that the preparation of the foundation for grave monuments could be done only by the cemetery owning the lot. Plaintiff claimed that such agreement constituted an illegal tying arrangement and that it was thereby damaged by its exclusion from the foundation preparation market.

The District Court found after trial that plaintiff had failed to prove either fact of damage or amount of damages. The Eighth Circuit concluded that the District Court's finding of no fact of damage was clearly erroneous and reversed on that issue; but the Circuit Court further concluded that the District Court's finding that plaintiff had failed to prove amount of damages was not clearly erroneous, so it affirmed the denial of compensatory damages. The Eighth Circuit nevertheless awarded nominal damages, reasoning as follows:

> "An award of damages may not be based upon mere speculation. However, appellant's evidence was insufficient only as to measurement of damages." (*Id.* at p. 1146.)

There is nothing in the Eighth Circuit's opinion to suggest that nominal damages should be awarded in Section 4 cases where, as here, plaintiffs have failed to prove even *fact* of damage. Indeed, the above-quoted language suggests the contrary.

Petitioners' reliance upon *Knutson v. Daily Review Inc.*, 664 F.2d 1120 (9th Cir. 1981) is misplaced for the same reason. The District Court, applying the law of the case from a prior appeal, found that plaintiffs had shown fact of damage. *Knutson v. Daily Review, Inc.*, 468 F. Supp. 226, 232 (N.D. Cal. 1979). However, the District Court found that plaintiffs had failed to prove the amount of their damages. Nevertheless, expressly relying upon the "fact of injury" determination, the District Court ruled that nominal damages should be awarded. (*Id.* at p. 235, fn 10.)

The Ninth Circuit's affirmance of the District Court's award of nominal damages in *Knutson* should not be interpreted to mean that proof of fact of damage is unnecessary. Again, the opinions of the District Court and Circuit Court indicate that the finding of fact of injury was a prerequisite to the nominal damages award.

The last case cited by petitioners to show the purported division of the Courts of Appeals, *Fleer Corp. v. Topps Chewing Gum, Inc.*, 501 F. Supp. 485 (E.D. Pa. 1980), *rev'd on other grounds*, 658 F.2d 139 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), lends even less support to petitioners' contention. As the District Court therein held:

> "In a small number of well-reasoned decisions, courts have awarded nominal damages under § 4 of the Clayton Act where injury-in-fact was shown, but the amount of injury was not capable of calculation" (501 F. Supp. at p. 514).

The Third Circuit ruled that there had been no antitrust violation, so it did not reach the damages issues. Again, there is no conflict with the subject decision of the Second Circuit.

Significantly, petitioners appear to be the only ones who have noticed a "conflict" among the Circuit Courts on the issue of

nominal damages in Section 4 cases. No cited case or commentator refers to any such conflict. Plainly, no such conflict exists.

Moreover, the question of whether nominal damages should be awarded in a Section 4 case where no fact of damage is proved does not appear to be of such great importance to the American public that it should be definitively resolved by this Court even absent a conflict among the Courts of Appeals. *Carey v. Piphus*, 435 U.S. 247 (1978), cited in the Petition (at p. 9), does not mandate such a conclusion. In upholding nominal damages without proof of actual injury to plaintiffs who have been deprived of procedural due process, this Court emphasized the "absolute" nature of the right to due process and "the importance to organized society that procedural due process be observed" (*Id.* at p. 266). In stark contrast, this Court has held that Section 4 of the Clayton Act is essentially "a remedial statute" which authorizes an award of damages only to a person "who shall be injured in his business or property. . . ." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

Finally, respondents respectfully submit that petitioners are not suitable parties to litigate in this Court questions concerning damages awardable in Section 4 cases where proof of actual injury is too difficult to establish adequately. Unlike market exclusion cases such as *Rosebrough*, involving claims of lost profit opportunity which are inherently difficult to quantify, petitioners quite easily could have established the amount by which respondents' prices were higher than free-market prices for comparable supplies—if in fact this had been the case. Indeed, *respondents* offered price-comparison data after petitioners failed to do so, which showed that outside prices were lower only for lesser-quality merchandise (93a-94a). Petitioners suggest that their failure to prove any overcharge was due to the nature of antitrust cases or respondents' misconduct, rather than their own default; but such contention is plainly false. As the District Court found:

> "[T]his is not a case where defendants' wrongful acts have eliminated data that would otherwise support the computation of damage claims. Rather, plaintiffs

> have chosen to avoid introducing any cost information other than Ro-Fi's costs" (85a-86a).

In sum, petitioners were found: (a) to have given false testimony on market prices at the liability trial (99a-100a); and (b) to have failed purposely to offer any proof of outside market prices at the damages trial (85a-86a). Petitioners' failure to offer such proof was due neither to respondents' wrongful actions nor to any inherent difficulty in the gathering or presentation of evidence. Rather, as set forth in the decisions below, the actual reason was that petitioners' claims of overcharge were specious. Under the circumstances, respondents respectfully submit that petitioners are not the appropriate parties to argue the nominal damages questions before this Court.

2. *The Refusal To Direct Reimbursement Of Franchise Royalties*

The Second Circuit affirmed the District Court's ruling that petitioners were not entitled to reimbursement of royalties paid to respondents under their franchise agreements. Citing *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441 (3rd Cir. 1967), *cert. denied*, 390 U.S. 947 (1968), the Second Circuit reasoned:

> "Damages in an antitrust action are intended to be compensatory, not punitive, and the statute prescribes the remedy for violation" (113a).

Once again, petitioners contend that the Second Circuit's aforesaid decision is in conflict with decisions in other circuits, *viz.*, *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) and *Milsen Co. v. Southland Corp.*, 454 F.2d 363 (7th Cir. 1971). Again, however, a more careful analysis reveals the lack of any direct conflict.

Thus, *Carpa* involved an *affirmative* claim by a franchisor found to have committed antitrust violations to recover unpaid royalties, which the District Court denied by application of the equitable doctrine of "unclean hands"; this is clearly distinguishable from the case presented to the Second Circuit, where the *franchisees* sought the affirmative relief. Further, the Fifth Cir-

cuit simply found that the District Court had committed "no error" in its application of the unclean hands doctrine; again, this is distinguishable from the case at bar where petitioners were asking the Court of Appeals to overturn the District Court's application of its powers as a court of equity.

The *Milsen* case similarly does not merit the reliance placed upon it by petitioners. Thus, the issue presented was whether the District Court had erroneously refused to issue a preliminary injunction against the termination of franchises for failure to pay franchise fees, where the franchisor was found to have violated the antitrust laws. While the Seventh Circuit ruled that the preliminary injunction should have been issued, the court declined to direct the return of franchise fees. Indeed, in referring the issue of franchise fees to the District Court, the Court of Appeals stated:

> "Our opinion does not compel a holding that plaintiffs owe no franchise or other fees to defendants." (*Id.* at p. 369.)

Accordingly, respondents respectfully submit that the Second Circuit did not create a conflict among the Courts of Appeals in rejecting petitioners' claim that previously paid royalties were a recoverable item of damage. Quite clearly, the Second Circuit did not "ignore" *Carpa* and *Milsen;* it merely—and properly—concluded that those cases were inapposite.

Moreover, the refusal of the Second Circuit to direct the refund of royalties paid under petitioners' franchise agreements does not raise issues of such import that a review thereof by this Court is needed. In fact, the Second Circuit was following this Court's imprimatur that "the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act." *Kelly v. Kosuga,* 358 U.S. 516, 519 (1959). *Accord: Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 754 (1947) (Warning against adoption of a "deadly remedy" of ending illegal business actions "by ending the business"). The Second Circuit noted that there was no evidence that these royalties represented overcharges to petitioners, but that "if they had, that would properly be part of

the damage award were one to be made" (113a). The Second Circuit's patent recognition and following of policies enunciated by this Court in the above-cited cases provides little reason for further review by this Court.

3. *The "Support Services" Issue*

Petitioners contended in the District Court and the Second Circuit that their damages for the alleged overcharge should be measured by the difference between the prices charged by the Ro-Fi depot for supplies and the underlying cost of those supplies to respondent Ro-Fi Corp. (65a-66a). Petitioners based this theory "on the assumption that, in a free market, the dealers would have organized a cooperative buying group with the purchasing power to buy merchandise at prices comparable to those available to Ro-Fi" (66a). Petitioners' selection of this theory of damages was prompted by the fact, discussed above, that the actual prices charged by respondent Ro-Fi Corp. to petitioners were no greater (and often less) than the prices for comparable items charged by available alternative suppliers (86a). Since the facts precluded petitioners from providing an overcharge *via* the most obvious means of a comparative market study, petitioners concocted the novel theory that the Ro-Fi supply depot's cost of goods sold *ipso facto* constituted fair-market prices; and that therefore Ro-Fi's *gross* profit established the alleged overcharge.

Both the District Court and the Second Circuit rejected petitioners' theory of damages essentially on two separate and independent grounds. First, petitioners had not established that it would have been reasonably possible for such an effective dealer cooperative to be organized. Indeed, the District Court concluded upon ample evidence in the record that petitioners had erroneously chosen the wholesale depot market "in which they had not dealt and for which there is no rational basis" (83a). In its affirmance, the Second Circuit found that petitioners "did not demonstrate any more than a theoretical possibility of organizing a dealer cooperative with the ability to do business directly with manufacturers or wholesale suppliers" (110a-111a).

The second reason for the lower courts' rejection of petitioners' damage theory was that, as the Court of Appeals put it, it failed to "take into account other services provided for them by appellee Ro-Fi, services which would have entailed some costs regardless of how they were obtained" (111a). As amplified by the District Court," . . . plaintiffs ask us to ignore the obviously necessary expenses for rent of the physical location, purchase, maintenance, insurance, etc. of equipment and employment of necessary staff" (78a). Thus, the courts below reasoned, even if petitioners had proven that a dealer cooperative could have effectively matched Ro-Fi's purchase prices for supplies, the substantial costs of operating such a dealer cooperative would have to be allocated among the members—just as Ro-Fi had to pass on such costs to its customers.

Petitioners contend herein that the Court of Appeals erroneously placed upon them "the burden of showing the nature and extent of costs incidental to the purchase of goods on the open market, had the violation not occurred. . . ." (Petition at p. 14). Petitioners further contend that such determination squarely conflicts with decisions of other Courts of Appeals. Again, however, petitioners' argument is specious.

Initially, the "support services" issue posited by petitioners is not squarely presented by the record. As set forth above, the opinions below also rejected petitioners' theory of damages for the separate and independent reason that petitioners had failed to establish that they could have purchased supplies from manufacturers at the same reduced depot prices paid by Ro-Fi Corp. There is no need to reach the "support services" question if the basic cost question was determined adversely to petitioners.

Moreover, contrary to petitioners' argument, saving dealers the costs inherent in a dealer cooperative is not properly characterized as a "beneficial byproduct" resulting from the claimed violation. As the courts below properly recognized, the issue before them was whether members of plaintiff class suffered proximate injury by reason of the alleged violation, *i.e.*, whether a franchisee could have saved money by buying comparable supplies outside the Ro-Fi depot. Respondents offered proof at

the damages trial, to the lower courts' satisfaction, that any franchisee who joined a hypothetical purchasing cooperative would be required to share in the necessary costs and expenses incident thereto. This added cost to the individual dealer would not be a "byproduct" of his purchase, but rather a definite addition to his cost of purchase.

Finally, regardless of which side had the burden of proving the numerous expenses incidental to operation of a supply depot, the fact is that *respondents* assumed this burden themselves at the damages trial anyway, offering detailed proof of costs such as utilities, rent, salaries, maintenance of freezers and refrigerators, credit, etc. which any supply depot—cooperative or otherwise—must necessarily incur. Accordingly, the question of which side had the burden of persuasion on the issue is essentially moot.

Under the circumstances, review by this Court of this issue would be unnecessary and inappropriate.

CONCLUSION

The Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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